Filed 1/22/19 P. v. Garcia CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT GARCIA,

Defendant and Appellant.

F073921

(Tulare Super. Ct. No. PCF317388B)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary Johnson, Judge.

Timothy E. Warriner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Darren Indermill, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant/appellant Albert Garcia was charged with attempted murder (Pen. Code §§ 664/187, subd. (a); count 1)[1] committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subds. (b)(1)(C) & (b)(5)); and assault with a deadly weapon (§ 245, subd. (a)(1); count 2) committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(b)); and street terrorism (§ 186.22, subd. (a); count 3.)[2]

A jury convicted defendant on all counts and found the gang allegations true. On count 1, the court sentenced defendant to life with the possibility of parole, with minimum parole eligibility of 15 years (§ 186.22, subd. (b)(5).) On count 2, the court sentenced defendant to an aggravated term of four years, plus five years for the gang enhancement, stayed pursuant to section 654.[3] (§ 186.22, subd., (b)(1)(B).) On count 3, the court sentenced defendant to an aggravated term of three years, stayed pursuant to section 654.

Defendant appeals. We order a correction to the abstract of judgment and otherwise affirm.

FACTS

On the evening of April 28, 2015, Jose A.[4] went to an alley in Porterville to meet up with a friend named "Beto." Jose planned to give Beto a ride to get something to eat.

Jose stopped his truck in the alley. Some distance away, he saw "a lot of people" at what appeared to be a party. However, Jose did not see Beto. Jose initially testified

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[1] All further statutory references are to the Penal Code unless otherwise noted.

[2] Codefendant Elijah Perez, who is not a party to this appeal, was also charged with these crimes, in addition to other crimes.

[3] The court stayed the sentence on count 2 pursuant to section 654. The abstract of judgment does not reflect this.

[4] To further personal privacy interests, we will refer to the victim and witnesses by first name and last initial. (Cal. Rules of Court, rule 8.90(b) & (b)(10).)

that he got out of his truck and smoked a joint for about 20 minutes, but before he finished the joint, he was attacked by "like ten" people.

In subsequent testimony, and in interviews with law enforcement in the hours and days after the incident, Jose said he went *inside* the nearby residence of someone named Megan D., planning to pick up Beto there and "smoke a joint." A "chubby dude" came inside and said to Jose: " 'Hey, can I talk to you real quick?' " Jose went outside where defendant and over a dozen others were there standing in a "bunch." They surrounded Jose and assaulted him. He was stabbed nine or 10 times during the assault by an unidentified teenager wearing a red shirt.

Jose somehow got to his brother's front porch, where he was found bleeding from stab wounds, drifting in and out of consciousness. Responding Porterville Police Officer Vargas asked Jose where the incident had occurred, and Jose directed him towards Tomah Avenue just east of Prospect Avenue. Vargas traveled that direction and saw a trail of blood. Near the blood trail, Vargas found a Ford F-150 with an open door and shattered window. Found inside the F-150 were three baggies of a substance that tested presumptively positive for methamphetamine.

Post-incident Interviews with Jose

Detective Tashiro responded to the hospital where Jose was taken. Jose was in critical but stable condition. Jose was loopy, in a lot of pain, and was reluctant to talk at first. Eventually, Jose identified two of his attackers: "Elijah" and someone with the moniker "B-rad."

Jose said that B-rad had confronted him over being a gang dropout. B-rad asked Jose if he remembered him. After Jose said he did remember, a group of 15 to 20 people attacked him. Several of them were punching him, and one person stabbed him. Elijah was telling people to attack Jose.

On the next day, Detective Tashiro spoke with Jose again. Jose appeared to be in a lot less pain and said he was doing better. Jose picked Elijah Perez out of a lineup.

Jose also provided a description of B-rad: a bald, white "regular dorky, chunky" 30-year-old,[5] who does not look like a gangster but was actually "[k]ind of" an "OG."[6] Later that day, Detective Tashiro showed Jose a picture of defendant and Jose said, " 'That's B-rad.' "

Jose also gave additional details about the attack. The person who stabbed him was a "youngster" (15 or 16 years old) wearing a red shirt. The assailants yelled out, " 'West Side,' " during the attack. Defendant and Elijah Perez were the "main one[s]" involved in the attack. Perez told everyone, " 'Stop him, stop him,' " when Jose took off running. Defendant and Perez were both hitting Jose during the attack.

Law Enforcement Investigation

Law enforcement searched the home where defendant was living. Defendant stored his items in a closet in the southeastern bedroom of the residence. He had red clothing in the closet and "little, if any, blue clothing …." Defendant himself had several tattoos, including a "T" on one arm and a "C" on the other. Detective Hatch testified that the tattoos "form the abbreviation of T and C, and based on my previous experience dealing with Northern gang members they often have T.C. to denote their loyalty and affiliation with the Tulare County Northern gang clique."

Detective Hatch looked for signs defendant had been in an altercation and found a circular red mark on the back of his scalp approximately three inches in diameter.

Detective Tashiro tried to contact Megan D., who lived at the home outside of which the stabbing occurred. Megan said she was willing to cooperate but did not want to talk to law enforcement where gang members might be watching. They made

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[5] Jose was 31 at the time, and he estimated B-rad was a year or two younger than him. Defendant is about six and a half or seven years younger than Jose.

[6] OG is a term used by gang members to describe someone who is "old school" or has been in the gang for a long time or was involved in the original development of the gang.

arrangements to speak with Megan at a safe location nearby. However, Megan never showed up. After three to four months, an investigator with the district attorney's office was able to contact her. She was scared and did not want to testify. The investigator had to arrest her and bring her to court.

The investigator also had difficulty locating Jose. The investigator had to arrest Jose and bring him into court on a body attachment. At trial, Jose said he did not remember talking to a peace officer after the attack, did not remember someone asking to speak with him outside, did not remember identifying Elijah as being involved in the attack, and did not remember the name "B-rad" at all.

Gang Expert

Porterville Police Detective Kirk testified that the two primary gangs in Porterville are the Norteños (i.e., Northerners) and the Sureños (i.e., Southerners). There are three Norteño subsets in Porterville: the East Side Poros (i.e., the East Side Varios Poros, or "ESP," or "ESVP"); the Varios Centro Poros (i.e., "VCP"); and the West Side Poros (i.e., "WSP").

Predicate Offenses

The prosecutor asked Detective Kirk if he had "researched" specific crimes committed by Norteño gang members in preparation for the present case. Kirk responded that he had. First, Kirk described a robbery committed in June 2009:

> "Several known and identified Northern gang members, Josue Sanchez and Roman Hernandez, contacted an individual in front of Galaxy 9 Theater here in Porterville and asked him what he had, what he had for them and while Sanchez pointed a revolver in his face, Sanchez and another gang member then began to assault the individual. [¶] Sanchez hit the individual in the face with a revolver and eventually they took the individual's wallet and then fled the area in the vehicle. They were later contacted and found to be in possession of the victim's property and arrested for that case. [¶] During Hernandez's Mirandized interview in regards to that case, he had said that this was his first day as a Norteno gang member and basically they were out on a crime spree to celebrate his first day as a Norteno …."

Later, the prosecutor asked whether, in the course of Detective Kirk's "preparation for this case," he "uncover[ed]" another predicate crime by a Norteño. Kirk described the second predicate offense as follows:

> "[I]n April of 2011, three individuals were seated in their vehicle at Murry Park when they were approached by between ten and 12 Norteno gang members. [¶] They ordered them, the three individuals, out of the vehicle and to lay face down on the ground. The three individuals did it out of fear due to being outnumbered. The Norteno gang members then took the individuals's wallets and began physically assaulting all three of them. [¶] One of the individuals was severely stabbed during the assault. The Norteno gang members … were in the party in the area and while doing so were yelling 'Norte,' and three of the Norteno gang members were later caught and taken into custody …."

A man named Pedro Ayon was convicted in connection with the 2011 offense.

Norteño Dropouts

Detective Kirk testified that one of the rules for the Norteño gang is that once you are a member of the gang, you must remain a member for life. Dropping out of the gang is "completely unacceptable." If a Norteño sees a dropout "on the streets," the Norteño "would be expected to commit some sort of assault on that individual or maybe gather intel on what they are doing, something to benefit the Norteno gang and punish that individual in some way."

Defendant

Detective Kirk opined that defendant is an active Northern gang member. Kirk testified that defendant met six criteria of active Norteño gang membership: (1) he is a self-admitted Norteño gang member; (2) he has been contacted at known Norteño gang hangout sites; (3) he has been contacted wearing Northern gang-related attire; (4) he has been contacted with numerous Norteño gang associates; (5) he has Norteño-associated tattoos; and (6) he has been arrested for crimes consistent with gang activity.[7]

[7] Additional gang testimony is described in connection with issue V in the Discussion section of this opinion.

DISCUSSION

I. Substantial Evidence Supports Intent to Kill

Defendant argues there was insufficient evidence that he personally intended to kill Jose.

A. Law

"In addressing a claim of insufficient evidence to support a conviction, this court ' "reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." ' [Citation.] 'We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 345.)

Intent to kill may be proved by circumstantial evidence. (*People v. Morton* (1947) 79 Cal.App.2d 828, 843–844.) Indeed, because there is rarely direct evidence of a defendant's intent, it is usually shown by the circumstances. (See *People v. Vu* (2006) 143 Cal.App.4th 1009, 1025.)

B. Analysis

The record reveals evidence supporting the inferences described below. Defendant was an "OG," or longstanding Northern gang member. Jose had dropped out of a Northern gang.[8] Gang members sometimes commit assaults, attempted murders and murders against drop outs.

[8] Jose had been an "eastsider" in a Northern gang. Defendant may have been a "westsider" in a Northern gang.

Someone asked Jose to come outside where defendant and the other assailants were standing in a "bunch." Defendant confronted Jose about being a "rat," and then 15 to 20 people began attacking Jose. Defendant joined the others in hitting Jose.[9] One of the younger assailants stabbed Jose nine or 10 times. When Jose ran away, Perez yelled, " 'Stop him, stop him.' "

Jose told law enforcement that the attack happened "because of" defendant. "It happened because he was the one that told them about me." The assailants thought Jose had "ratted on them a while back …."

The jury could have accepted a reasonable chain of inferences to conclude defendant intended for Jose to die. First – the evidence that Jose was brought outside to a group of individuals standing in a "bunch" and was then quickly assaulted – gives rise to an inference the assault was planned, even if only shortly beforehand. Second – defendant's stature in the gang, the relative youth of the other participants, and Jose's testimony that the attack happened "because of" what defendant told the other assailants – gives rise to the inference that any planning by the group was led by, or at least acquiesced to, by defendant. Third – the fact that the group thought Jose was a "rat," that Jose was stabbed multiple times, and that Perez tried to stop Jose from escaping – gives rise to the inference that the plan was to kill Jose rather than merely assault or injure him. These conclusions, which are reasonable and supported by evidence, support a finding that defendant personally intended for Jose to die. As a result, we reject defendant's challenge.

II. The Prosecutor did not Convey to Jury Extra-Record Evidence that Gerald S. Identified Defendants as the Perpetrators

Defendant claims the prosecutor introduced facts outside the record in closing summation.

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[9] This evidence defeats defendant's claim that there was no evidence he facilitated or "participated in the assault."

A. Background

Christina D. testified that in April 2015 she lived in a trailer on Tomah Avenue in Porterville. Christina's boyfriend, Gerald S., also lived in the trailer. At trial, Christina claimed she did not remember "anything" from the date of the incident. However, she admitted that she told Detective Ward that she was at Megan's house when a tall, "chunky Mexican" with "short hair" arrived. She testified this individual was the same person depicted in Exhibit 10, which was a picture of Jose. Megan testified that Jose then went to speak with Gerald outside. Jose was then surrounded by a "bunch of people."

Genaro Pinon, an investigator with the district attorney's office, testified that he searched for Gerald for three months and could not locate him.

During closing summation, the prosecutor said:

> "There's really a river of fear that's been seeping through this entire case. Every one of the witnesses has been affected by it. Each civilian witness that we brought up has been either unwilling to repeat their statement about the gang, unwilling to repeat the statements that they had, unwilling to come forward and testify.
>
> "You can certainly see visibly Megan [D.], how she was shaking while making the identification. You could see that Christina [D.] got shaken up and started almost crying when I was trying to go into the details about what she remembers. There was real fear here and the fear goes to another thing which is the believability of witnesses, and the believability of what they saw.
>
> "None of the witnesses have a motive that has been discussed, mentioned or thought of for why they would want to pick out Elijah Perez and Albert Garcia as the people involved. None of them has anything to gain."

The prosecutor later argued that it was not in Jose's interest to identify the defendants either. The following exchange then occurred:

> "Moreover, the other people that were also involved, Megan [D.], what possible motive does she have to make up the people she saw involved in this attack? None. She wasn't willing to do it because we had to go find her and get her out of hiding in the back of an apartment. What

> motive does Christina [D.] have? None. None of these witnesses have any motivation to lie. And moreover, as I mentioned, Gerald [S.] is in hiding. We can't find him. We spent three months looking for him. He doesn't want to come into court. That all goes to show you –
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> "[Defense counsel:] Objection, states facts not in evidence.
>
> "[Prosecutor:] I believe there was evidence of Gerald [S.] not being able to be found."
>
> "[Defense counsel:] Not the ID.
>
> "THE COURT: Any further statement other than they couldn't find him, you cannot consider. Sustained."

Defendant argues the prosecutor's argument impermissibly conveyed facts outside the record by suggesting to the jury that Gerald "had also identified the defendants, but could not be located because he was afraid of gang reprisal." We do not agree with defendant's characterization of the prosecutor's comments. The prosecutor in no way suggested Gerald had identified the defendants as perpetrators. Rather, the prosecutor mentioned the inability to locate Gerald to bolster his claim that fear of gang reprisal had affected multiple witnesses. But the prosecutor made no claim about the substance of what Gerald would say if found. Because the prosecutor did not indicate that Gerald had identified the defendants as perpetrators, we reject defendant's claim of misconduct.[10]

III. Prosecutor's References to Generalized Anti-Gang, and Law and Order Sentiments were Harmless

Defendant argues that the prosecutor made improper appeals to the jury's passion about gangs and law and order.

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[10] In his reply brief, defendant argues that because the prosecutor mentioned Gerald S. after discussing two other witnesses who had identified defendant (Christina D. and Megan D.), the prosecutor thereby "implied that [Gerald S.] also identified" him. We disagree.

A. Background

During closing summation, the following occurred:

> "[Prosecutor:] This case is a very important case, not just because Jose [A.] who is the victim that he is involved in a lot of bad things before, involved in a lot of gangs before, may not be the most sympathetic victim, involved in drugs. It's not really all about him. It's about whether or not we allow the Norteno street gang to rule our streets. It's about whether or not we allow them –
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> "[Defense counsel:] Objection, improper argument.
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> "THE COURT: Overruled.
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> "[Prosecutor:] It's about whether we allow him to intimidate to stop them from coming forward to report crimes, and we allow them, to let gang crimes go punished. The fact that Jose [A.] was almost killed is a testament of what Nortenos can do and if these individuals are not held accountable it will no doubt occur again.
>
> "We are going to ask you to follow the evidence in this case and we believe based on the evidence, there's no other reasonable explanation that these two gang members attempted to kill Jose [A.] for being a traitor to the gang and being a rat. It's the only thing that makes sense and we ask that you follow that in your verdict.
>
> "Thank you very much."

B. Analysis

In *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142 (*Weatherspoon*), the prosecutor argued to the jury that convicting the defendant " 'is gonna make you comfortable knowing there's not convicted felons on the street with loaded handguns, …" (*Id.* at p. 1149.) Later, the prosecutor argued that "finding this man guilty is gonna protect other individuals in this community.' " (*Ibid.*) The Ninth Circuit found the argument improper, noting " '[a] prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking.' " (*Ibid.*)

The Attorney General acknowledges that "some of the prosecutor's remarks, regarding holding Norteno members accountable, might be considered objectionable under the standards cited above, …" However, improper emotional appeals are subject to harmless error review. (E.g., *People v. Simington* (1993) 19 Cal.App.4th 1374, 1379.) We hold that, while some of the prosecutor's comments may have come close to being impertinent, they were not egregious nor prejudicial.

While the prosecutor did briefly suggest the jury should be motivated, in part, by a desire to hold the Norteño gang "accountable" or to prevent the gang from "rul[ing] our streets," the prosecutor then acknowledged that the jury should "follow the evidence in this case" and that based on the evidence, defendants were guilty of the charged crime. These latter comments do not vindicate the prior remarks. However, it is highly improbable that the jury ignored its directives regarding case-specific responsibilities in favor of generalized concerns over gang crime.

Several instructions had the same effect of making clear to the jury that their job was to look at the evidence of this case, and not to consider the gang issue in the abstract.

Moreover, the court instructed the jury:

> "Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you must find them not guilty. [¶] You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom or a jury view. Evidence is the sworn testimony of witnesses, the evidence admitted into evidence and anything else that I tell you to consider as evidence. [¶] Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case but their remarks are not evidence."

Later, the court instructed the jury:

> "You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose and knowledge that are required to prove the gang-related crimes and enhancements or special allegations charged or the defendant had a motive to commit the crimes charged. [¶] You may also consider this evidence

> when you evaluate the credibility or believability of a witness and when you consider the facts or information relied on by an expert witness in reaching his or her opinion. *You may not consider this evidence for any other purpose*." (Italics added.)

Contrary to suggestions in defendant's reply brief and in *Weatherspoon*,[11] California courts assume juries follow instructions. (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73.)

Given these instructions, the brevity of the prosecutor's arguably objectionable comments, and the other comments by the prosecutor directing the jury to base its decision on the evidence of guilt, we are confident the jury did not base its verdicts on a generalized desire to promote law and order or oppose gangs.

IV. The Trial Court did not Prejudicially Err in Denying Defendant's Motion for Mistrial

Detective Kirk testified before the jury that the last documented law enforcement contact involving defendant (excluding the present case) was when he was contacted as a passenger in a vehicle with Richard Montijo. Kirk later testified Montijo was a "high ranking" Norteño gang member. Kirk also testified that Montijo had attended a previous court hearing (i.e., the preliminary hearing) in the present case.

Outside the presence of the jury, defense counsel argued Montijo's presence at the prior court hearing was not "disclosed" to the defense. Defense counsel said that if he had known about Montijo's presence at court, he would have "checked … the Court's calendar to see if he had anything involving himself but we were denied that opportunity." The court instructed the jury that the testimony concerning Montijo's presence at the prior court hearing was stricken but denied a defense motion for a mistrial. Defendant argues the court erred.

" '[A] mistrial should be granted "only when ' "a party's chances of receiving a fair trial have been irreparably damaged." ' " [Citation.] We review the trial court's

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[11] See *Weatherspoon*, *supra*, 410 F.3d at p. 1151.

ruling for abuse of discretion ….' [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 453.)

Defendant argues the nondisclosure hindered his ability to counter the inference that he was connected to a high-ranking gang leader. But that inference was raised by other competent evidence: Detective Kirk's testimony that law enforcement contacted defendant as a passenger in Montijo's vehicle in 2013. While Montijo's presence at a prior court hearing may have incrementally strengthened the inference, we cannot say defendant's " ' " ' "chances of receiving a fair trial [were] irreparably damaged." ' " ' " (*People v. Panah*, *supra*, 35 Cal.4th at p. 453.)

Moreover, the jury was instructed to disregard the testimony concerning Montijo's attendance at the prior hearing, and we assume juries follow such instructions. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469.) Defendant argues the "admonition did not cure the problem as the jury should never have learned that Montijo was present." But that is true whenever the court strikes improper testimony. By defendant's reasoning, striking testimony and instructing jurors to disregard it *never* avoids prejudice because the jury should never have heard the stricken testimony. This is simply not the law in California. (*Ibid.*)

As a result, we find no prejudicial error.

V. Defendant's Claim of Error Under *Sanchez* is Forfeited

Defendant claims that several parts of the gang testimony offered by Detectives Kirk and Tashiro violates *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). In that case, the Supreme Court held that experts cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

The Attorney General argues defendant forfeited this claim by presenting it in a perfunctory and conclusory manner. The Attorney General observes that defendant "does not discuss in any detail whether the testimony in question is testimonial" nor does he

"discuss in any depth whether the testimony may have stemmed from the testifying officers' personal knowledge; whether the matters testified to were case-specific knowledge as opposed to relating to general background information; or even whether the evidence in question was admitted for its truth."

We agree defendant has forfeited this contention. Moreover, there was significant *admissible* evidence of defendant's gang membership, rendering any *Sanchez* error harmless.

A. Law

Claims of error on appeal must be supported by analysis. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37.) Appellate issues may not be raised in a perfunctory or conclusory manner. (See *People v. Griffin* (2004) 33 Cal.4th 536, 589, fn. 25, disapproved on other grounds by *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) An appellant must do more than raise an issue – they must also sufficiently develop arguments and legal analysis supporting the claim. (See *People v. Aguayo* (2018) 26 Cal.App.5th 714, 726; *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 32–33.)

B. Analysis

Here, defendant's opening brief describes *Sanchez* in one paragraph, then lists nearly *four pages* of testimony ranging on topics from predicate offenses to fellow gang member Richard Montijo. There is virtually no legal analysis whatsoever, until the last four sentences of the section:

> "The foregoing matter constitutes inadmissible hearsay. (Evid. Code, §§ 225 and 1200.) It is also testimonial hearsay pursuant to *Crawford v. Washington* (2004) 541 U.S. 36. (*Sanchez, supra*, 63 Cal.4th at 687–698.) These were not matters that the witnesses personally observed, instead, the witnesses relayed information from police investigative reports, gathered for the purpose of prosecution. Therefore, its admission into evidence at Mr. Garcia's trial violated his Sixth

Amendment right to confront and cross-examine the witnesses against him."

These blanket, conclusory assertions will not suffice. Under *Sanchez*, gang expert testimony is objectionable if it is case-specific testimonial hearsay. Determining whether evidence is testimonial is a highly particularized, and fact-intensive inquiry. (Cf. *In re Grand Jury Subpoena (Mr. S.)* (1st. Cir. 2011) 662 F.3d 65, 73; *Doe v. United States (In re Grand Jury Subpoena)* (9th. Cir. 2004) 383 F.3d 905, 909–910.) Yet, defendant does not explain how *each* of the purportedly objectionable statements are testimonial. Analyzing various claims of *Sanchez* error arising from different parts of gang experts' testimony simply cannot be done "in bulk." Defendant's opening brief failed to sufficiently develop the argument for our review, and thereby forfeited it.

C. Any Error was Harmless

In any event, any *Sanchez* error was harmless in light of the significant admissible evidence of defendant's gang membership, outlined below.[12]

1. There was Overwhelming, Admissible Evidence of Defendant's Gang Membership

Sergeant Miller testified that he personally made contact with defendant on May 2, 2008. During the contact, defendant said he was a "Northern" gang member. Defendant was with another individual who identified himself as an "East Side Poros" gang member.

Officer Garcia testified that in October 2008, he personally made contact with defendant. Defendant, who was in custody, told Officer Garcia that he was a member of the "West Side Poros" gang.

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[12] Defendant also cites certain testimony concerning Richard Montijo, which his own counsel elicited. Pursuant to the doctrine of invited error, defendant cannot be heard to complain of testimony elicited by his own counsel. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139; *People v. Williams* (2009) 170 Cal.App.4th 587, 620.) We see nothing prejudicial about any other testimony concerning Montijo.

Officer Sokoloff testified that he personally made contact with defendant on March 18, 2010. Defendant said he was a "Northern" gang member.

Detective Kirk testified defendant has a tattoo with the letters "TC" in one portion of the tattoo, and the letter "N" on the lower-left part of the tattoo. The "N" stands for North Side, Norteño, or Northerners. When asked if "gang culture" permits people who are not Norteño gang members to walk around with an "N" and "TC" tattoo, Detective Kirk replied, "No. As I said earlier, in order for one to get a tattoo, they are required to have done something for the gang."

Because this evidence overwhelmingly demonstrates defendant's gang affiliation, any *Sanchez* error concerning that issue is harmless.

2. There was Admissible Evidence of the Predicate Offenses

Defendant also contends that Detective Kirk's testimony about the two predicate offenses violated *Sanchez*. First, Kirk testified he personally investigated the 2009 predicate offense. Defendant's opening brief incorrectly says Kirk testified he had nothing to do with the investigations "connected to the 'predicate' offenses." In his reply brief, defendant acknowledges Kirk "had some involvement" in the investigation or prosecution of the 2009 offense. However, defendant argues there is no evidence that Kirk had personal knowledge of all the details he gave. But the lack of evidence on the extent of Kirk's first-hand knowledge does not work in defendant's favor. The fact that the "record is not clear enough for this court to conclude which portions of the expert's testimony involved testimonial hearsay" means that defendant "has not demonstrated a violation of the confrontation clause" with respect to that testimony. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 586.)

Moreover, there was separate evidence establishing the predicate offenses: certified records of the convictions of Josue Sanchez (2009 predicate offense) and Pedro Ayon (2011 predicate offense). As defendant correctly observes, Detective Kirk's testimony went beyond the mere fact that convictions occurred, by describing the events

underlying the convictions. But the testimony concerned the conduct of people other than defendant. Certainly, the circumstances of the predicate offenses reflect poorly on the Norteño gang, but we do not find that fact prejudicial.

3. There was Admissible Evidence Defendant was "B-rad"

Defendant argues that Detective Tashiro's testimony that police records indicated defendant was also known as "b-rat" violated Sanchez. However, the fact that defendant was also known as "B-rad" was separately established by Jose's direct testimony. The fact that police records indicated defendant was also known as "b-rat" was cumulative and nonprejudicial.

VI. Defendant Forfeited *Elizalde* Issue by Failing to Object Below

Defendant contends the court erred in admitting his responses to jail classification questions. We find the issue forfeited for failing to object below.

A. Background

Detective Kirk testified that the Tulare County Sheriff's Office has inmates complete a form, which includes the question: " 'Do you associate with any street or prison gangs?' " Garcia and Perez wrote, "North or Northern or something to that effect on that form during the booking process" on "several occasions." The defense did not object to this testimony.

B. Law and Analysis

Defendant claims Detective Kirk's testimony runs afoul of *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), which held that an arrestee's un-*Mirandized* answers to gang affiliation questions during the booking process may not be admitted in the prosecution's case-in-chief.

The Attorney General argues defendant forfeited this claim by failing to object below. We agree.

A judgment will not be reversed on grounds that evidence has been erroneously admitted unless "[t]here appears of record an objection to or a motion to exclude or to

strike the evidence that was timely made and so *stated as to make clear the specific ground of the objection or motion; ...*" (Evid. Code, § 353, subd. (a), italics added.) Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. [Citations.] *Miranda*-based[**13**] claims are governed by this rule. " 'The general rule is that a defendant must make a specific objection on *Miranda* grounds at the trial level in order to raise a *Miranda* claim on appeal.' [Citation.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 853–854.)

Defendant argues his claim is not forfeited because this area of law was unsettled at the time of trial.**14** But *Elizalde* was decided in June 2015, and trial in the present matter began in February 2016.

Defendant counters that while *Elizalde* had been decided at the time of trial, *Sanchez* had not. Defendant argues that under pre-*Sanchez* authority, Detective Kirk's testimony concerning the booking question responses was admissible hearsay. But the fact that *Sanchez* had not been decided does not impact defendant's *Miranda* claim. *Sanchez* concerns testimonial hearsay and the constitutional right to confrontation. *Elizalde* concerns the right to *Miranda* warnings before booking question responses are used in the prosecution's case-in-chief. The fact that *Sanchez* may have altered the

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13 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)

14 In the alternative, defendant suggests the failure to object constituted ineffective assistance of counsel. When the record on appeal does not show why counsel failed to act, the judgment must be affirmed "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, …" (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.) Here, we cannot say there "simply could be no satisfactory explanation" for declining to object on *Miranda* grounds. One possibility is that, on those prior dates, Garcia had been *Mirandized* when initially arrested, and that advisement was sufficiently close in time and context so as to cover the subsequent booking interviews. (See generally *People v. Schenk* (1972) 24 Cal.App.3d 233.) Because plausible, satisfactory explanations *could* exist, defendant's claim cannot prevail on direct appeal.

analysis of any hearsay or confrontation clause objection does not impact the analysis of a *Miranda* objection under *Elizalde*.

DISPOSITION

The matter is remanded for the trial court to direct preparation of a new abstract of judgment reflecting that the sentence on count 2 is stayed pursuant to section 654, and to have copies of the abstract transmitted to the appropriate parties and entities. In all other respects, the judgment is affirmed.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
DETJEN, J.

_____
PEÑA, J.